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University of California

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

TANIA P., an individual,

Plaintiff

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA; and DOES 1-10,
Inclusive.

Defendants.

Case No.: 2:22-cv-02959-GW-MRWx
*Assigned to the Hon. George H. Wu,
Courtroom 9D*

**NOTICE OF MOTION AND
MOTION TO DISMISS
COMPLAINT**

*[Filed concurrently with Local Rule 7-
3 Declaration; Request for Judicial
Notice; [Proposed] Order]]*

DATE: July 28, 2022
TIME: 8:30 a.m.
CRTRM: 9D

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SANTA BARBARA, CALIFORNIA 93101

NOTICE OF MOTION

PLEASE TAKE NOTICE that on July 28, 2022, at 8:30 a.m. in the courtroom of the Honorable George H. Wu, United States District Court for the Central District of California, located at 350 West First Street, Courtroom 9D, Los Angeles, CA 90012, Defendant The Regents of the University of California will, and hereby does, move to dismiss Plaintiff's Complaint [Dkt. 1-1] with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).¹ This motion is made following meet and confer efforts with counsel pursuant to Local Rule 7-3, which occurred on May 31, 2022. *See*, Declaration of Alison Bernal.

Plaintiff's Complaint is for gender discrimination in violation of Title IX and the companion state law claim, Education Code § 200, *et seq.* The two causes of action fail pursuant to Federal Rule of Procedure, Rule 12, for the following reasons:

1. Both claims are barred by the applicable two-year statute of limitations. The allegations show the assault occurred in May 2018 and Plaintiff reported it to the University in June 2019. Plaintiff did not file this Complaint until February 16, 2022.

2. Plaintiff has failed to allege facts sufficient to constitute a cause of action for deliberate indifference on a pre-assault theory.

3. Plaintiff has failed to allege facts sufficient to constitute a cause of action for deliberate indifference on a pre-assault theory.

4. Education Code § 220 does not apply to The Regents, and if it did, the statute contains an administrative exhaustion requirement that Plaintiff has not met nor alleged she met.

¹ While motions to strike are generally governed by Rule 23(f), *Whittlestone, Inc., v. Handi-Craft Co.*, 618 F.3d 970 (9th Cir. 2010), states that motions to strike damages are subject to a Rule 12(b)(6) motion. To the extent this Court disagrees, Defendant alternatively raises the motion to strike certain damages under Rule 12(f).

1 5. Plaintiff may not recover emotional distress damages under Title IX,
2 and thus the prayer for relief must be stricken to the extent it requests emotional
3 distress damages.

4 This motion is based on this Notice of Motion and Motion, the Memorandum
5 of Points and Authorities, the Request for Judicial Notice, the documents on file
6 with the Court, and such further evidence and argument as the Court may permit.

7
8 Dated: June 9, 2022

Respectfully submitted,

9
10 NYE, STIRLING, HALE & MILLER, LLP

11 Bv: /s/ Jonathan D. Miller

12 Jonathan D. Miller, Esq.

13 Alison Bernal, Esq.

14 Attorney for Defendants, THE
15 REGENTS OF THE UNIVERSITY OF
16 CALIFORNIA
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The University of California is committed to preventing the scourge of sexual assault. To that end, the University has established policies that outline prohibited sexual conduct, as well as procedures allowing the University to investigate and adjudicate allegations of such assaults. The plaintiff here, Tania P. (“Plaintiff”), a student at University of California, Santa Barbara, (“the University”) availed herself of those policies and procedures when she reported in June 2019 an alleged assault that occurred the prior school year, in May 2018. The University investigated her complaint and ultimately concluded that it was supported by a preponderance of the evidence. The University suspended her assailant for two years.

Now, four years later, Plaintiff has filed this lawsuit alleging The Regents violated Title IX and California Education Code § 220 on the theory The Regents acted with deliberate indifference toward Plaintiff’s report of sexual assault.

Plaintiff’s allegations cannot give rise to civil liability for multiple procedural and substantive reasons.

First, Plaintiff filed her Complaint outside the limitations period. The statute of limitations period for Title IX is borrowed from the state’s personal injury statute, which, under California law, is two years. *Doe v. Univ. of S. California*, 2019 WL 4229750, at *3 (C.D. Cal. July 9, 2019); *Stanley v. Trustees of CSU*, 433 F.3d 1129 (9th Cir. 2006) (analyzing under prior one-year statute for personal injury cases). Plaintiff filed her Complaint on February 16, 2022, and thus, to be timely, the claim must have occurred on or after February 16, 2020. But nearly all of the alleged events occurred before then, including Plaintiff’s assault (Dkt. 1-1, ¶ 10), Plaintiff’s report to the University, (*id.*, at ¶ 11), and the alleged delay in the commencement of the University’s investigation (*id.*, at ¶ 13). Moreover, the assailant graduated March 20, 2020, and the University had moved to remote instruction ten days prior, on March 10, 2020. (*Id.*, at ¶ 16; RFJN, Ex. 3.) Accordingly, there is at most a 23-day

1 window the University could have caused an actionable harm under Title IX, and
 2 nothing in the Complaint alleges any such harms occurred in this timeframe.

3 Second, Plaintiff has failed meet the elements of the pre-assault theory of
 4 liability under Title IX. *Karasek v. Regents* counsels that a pre-assault theory of
 5 liability under Title IX requires “(1) a school maintained a policy of deliberate
 6 indifference to reports of sexual misconduct, (2) which created a heightened risk of
 7 sexual harassment that was known or obvious (3) in a context subject to the school’s
 8 control, and (4) as a result, the plaintiff suffered harassment that was ‘so severe,
 9 pervasive, and objectively offensive that it can be said to [have] deprive[d] the
 10 [plaintiff] of access to the educational opportunities or benefits provided by the
 11 school.’” *Karasek*, 956 F.3d 1093, 1112 (9th Cir. 2020). The first element requires
 12 the University recognized an unreasonable risk and intended to expose Plaintiff to
 13 such risk, while the fourth element requires the University to have *caused* Plaintiff
 14 to have suffered severe, pervasive harassment. The facts alleged in the Complaint do
 15 not meet these requirements, as even if every allegation in the Complaint were true,
 16 Plaintiff has not alleged the assailant was a member of the purportedly errant
 17 fraternity, nor could she, as the University did not maintain a policy of deliberate
 18 indifference to reports of assault of the type suffered by Plaintiff. Nor do the facts
 19 alleged meet the third element of control. It is not enough for the University to have
 20 control over the respondent and the ability to discipline him; there must also be
 21 control over the context where the assault occurred. *Brown v. State*,
 22 23 F.4th 1173, 1180-81 (9th Cir. 2022). The Complaint contends the assault
 23 occurred in an off-campus fraternity.² The alleged assailant was not a member of the
 24

25
 26 ² The witnesses interviewed during the Title IX investigation contradicted this,
 27 stating the alleged assault occurred in the respondent’s off-campus apartment that
 28 was not affiliated with the fraternity in any way. Nevertheless, understanding the
 Court must accept Plaintiff’s allegations as true for purposes of a Rule 12 motion,
 the Complaint still fails to allege the requisite control as stated herein.

1 fraternity, which Plaintiff acknowledges. Thus, efforts to bring in allegations
 2 relating to the fraternity which the alleged assailant was not associated with simply
 3 have no bearing on this case. The Ninth Circuit just ruled on January 25, 2022, that
 4 in the context where a male student physically assaulted a female student at the male
 5 student's off-campus residence, the university lacked substantial control, and thus
 6 there was no deliberate indifference even where the university was allegedly
 7 deliberately indifferent to reports the *same* male student had physically assaulted
 8 two other female students. *Ibid.* Likewise here, the University lacked substantial
 9 control over the context of Plaintiff's alleged assault. And more compelling than
 10 *Brown*, Plaintiff does not allege the University had knowledge of prior assaults
 11 committed by this respondent. The lack of control is fatal to the Title IX and related
 12 California statutory claims.

13 Third, Plaintiff has failed to allege facts sufficient to sustain a claim for post-
 14 assault liability under Title IX Specifically, a plaintiff seeking to hold a university
 15 liable for its response to a reported sexual assault must plausibly plead: (1) the
 16 University exercised control over the harasser and the context in which the
 17 harassment occurred; (2) Plaintiff suffered harassment so severe and pervasive it
 18 deprived her of access to an educational opportunity; (3) the University had
 19 knowledge of the harassment; (4) the University acted with deliberate indifference
 20 to the harassment the plaintiff faced; and, (5) the deliberate indifference caused
 21 plaintiff to undergo harassment. *Davis Next Friend LaShonda D. v. Monroe County*
 22 *Bd. of Educ.*, 526 U.S. 629, 645-650 (1999). Here, the allegations cannot show the
 23 University, who abided by law enforcement's requested holds, then completed its
 24 investigation through a process which ultimately affirmed Plaintiff's version of
 25 events, made an "official decision...not to remedy the violation." *Oden v. N.*
 26 *Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006). Thus, Plaintiff's conclusory
 27 allegations in the Complaint do not establish the fourth or fifth element: deliberate
 28 indifference and causation. Moreover, like the pre-assault theory, the facts alleged

do not establish the control element: Plaintiff has not alleged she suffered further harassment caused by the University's deliberate indifference in a context within the University's control, nor could she, as the respondent was not within the University's control during the limitations period.

Fourth, Plaintiff's claim for violation of Education Code § 220 fails (1) for the same reasons discussed above with respect to their Title IX claims, (2) because Section 220 does not apply to postsecondary institutions such as the University (*Karasek v. Regents of the Univ. of Cal.*, 2015 WL 8527338, at * 18 (N.D. Cal., Dec. 11, 2015) ("section 220 does not apply to a postsecondary institution such as the University")), and (3) even if it did apply, Plaintiff has not exhausted the required administrative remedies. Cal. Educ. Code § 262.3 ("a person who alleges that he or she is a victim of discrimination may not seek civil remedies pursuant to this section until at least 60 days have elapsed from the filing of an appeal to the State Department of Education pursuant to Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations.").

Finally, the prayer for relief requests damages that are not available in Title IX actions since the Supreme Court's decision in *Cummings v. Premier Rehab Keller*, 142 S.Ct. 1562 (2022). The prayer for general damages and reference to emotional distress damages is not allowable, and thus must be dismissed.

At bottom, the University followed its procedures and state and federal law when investigating Plaintiff's reported assault. Thus, Plaintiff has failed to adequately plead a violation of Title IX or Education Code § 220 and the University cannot be held liable for deliberate indifference. For these reasons, and as more fully explained below, the University requests the Court grant its motion to dismiss.

II. RELEVANT FACTUAL BACKGROUND

In ruling on a motion to dismiss, the Court must accept all facts alleged in the complaint as true, together with those facts which may be judicially noticed. While The Regents disputes Plaintiff's version of facts set forth in the Complaint, they are

1 addressed as set forth by Plaintiff solely for purposes of this motion.

2 **A. University Policies on Sexual Assault**

3 The University has established policies on investigating and disciplining cases
4 of sexual assault alleged against students, which are publicly available on the
5 University's website. (RFJN, Ex. 1.) As is relevant here, the policies provide that
6 when the University receives a report of an alleged assault, the University will
7 provide the survivor with resources, including a CARE advocate to provide
8 confidential assistance. (*Id.*, at 9.) The advocate's assistance may include reporting
9 the assault if the survivor feels comfortable doing so, helping the survivor obtain a
10 "no contact" order, coordinating requests for academic or housing assistance, and
11 general assistance throughout the process. (*Id.*, at 9-10.)

12 The policies also outline the options a survivor has when choosing whether to
13 report an assault, including a report to law enforcement, a report to the University's
14 Title IX office, or both. (*Id.*, at 10-11.) If the survivor reports to law enforcement,
15 the Title IX investigation may be delayed at the request of the investigating agency.
16 (*Id.*) The policies set forth the procedure the University will use when investigating
17 and adjudicating a claim of sexual assault reported to the Title IX office, which
18 provide the survivor with access to resources, while accounting for the due process
19 rights available to respondents. (*Id.*, at 13-22.) At the conclusion of a Title IX
20 investigation, Title IX provides its preliminary determinations. (*Id.* at 20.)

21 If either party contests the Title IX investigator's preliminary determinations,
22 there will be a factfinding hearing before a hearing officer. The hearing is to
23 determine whether a violation of the SVSH Policy occurred. The University's role
24 in the hearing is neutral. (*Id.*, at 28.)

25 **B. The May 20, 2018, Incident and Investigation**

26 Plaintiff was a student at the University. (Dkt. 1-1, ¶ 9.) On May 20, 2018,
27 Plaintiff alleges another student assaulted her at an off-campus fraternity house. (*Id.*,
28 at ¶ 10.) Plaintiff does not allege the other student was a member of a fraternity, nor

1 could she, as the student was not a member of the fraternity and did not reside at the
2 fraternity house.

3 Plaintiff reported the incident to the Santa Barbara County Sheriff's
4 Department and the University Title IX office over a year later, on June 28, 2019,
5 completing the Title IX complaint form on July 22, 2019. (*Id.*, at ¶ 11.) The
6 Sheriff's Department requested the Title IX office hold its investigation to avoid
7 impacting the criminal investigation. (*Id.*, at ¶¶ 12-14, RFJN, Ex. 1, at pp. 6-7.)
8 Plaintiff alleges she did not authorize the law enforcement hold. (Dkt. 1-1, at ¶ 14.)
9 Nevertheless, it is a requirement of University policy to reasonably hold an
10 investigation at law enforcement's request. (RFJN, Ex. 1, at pp. 6-7.) In this case,
11 Plaintiff requested Title IX begin its investigation despite the Sheriff's requested
12 hold, and when Plaintiff made that request, Title IX accommodated her, beginning
13 its investigation on February 25, 2020. (Dkt. 1-1, at ¶ 13.)

14 The Title IX investigator interviewed several witnesses who were at the off-
15 campus residence on the night of the alleged assault and observed Plaintiff and the
16 respondent. The Title IX investigator, who the policies charge with making
17 credibility determinations as to the witnesses and parties, determined the
18 preponderance of evidence did not substantiate the allegation that the respondent
19 engaged in sexual assault-penetration against the complainant. Plaintiff contends
20 Title IX's November 2, 2020, report is "false and irrational" because it failed to
21 substantiate Plaintiff's complaint of sexual assault (something the law enforcement
22 investigation also failed to substantiate). (Dkt. 1-1, ¶ 22.)

23 Plaintiff thereafter followed the University procedures in place to challenge
24 Title IX's preliminary findings. (Dkt. 1-1, ¶ 31.) At the conclusion of the hearing,
25 where the witnesses who had previously participated in the Title IX investigation
26 declined to participate because of retaliation from their prior interviews, the hearing
27 officer reversed the preliminary finding and determined the preponderance of
28 evidence substantiated the allegation that Plaintiff was too incapacitated to consent.

(*Id.*, at ¶ 33.)

III. ARGUMENT

A. Legal Standard On Motion To Dismiss

A motion to dismiss under Federal Rule of Civil Procedure Rule 12(b)(6)³ requires the Court to determine whether the plaintiff has pled a cognizable claim in the complaint. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). To survive a motion to dismiss, a complaint must plead sufficient factual matter to “allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The emphasis is on factual pleadings, as a pleading that offers “labels and conclusions,” “a formulaic recitation of the elements of a cause of action” or “naked assertions devoid of further factual enhancement” will not suffice. *Id.*, citing and quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007). “[T]he factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

If a claim for relief cannot be cured by amendment, it should be dismissed without affording leave to amend. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).

B. Plaintiff’s Claims Are Untimely

Title IX claims brought in California are governed by California’s two-year limitations period for personal injury actions. *Doe*, 2019 WL 4229750, at *3 (citing *Stanley*, 433 F.3d at 1136). Education Code § 220 claims are likewise governed by the two-year limitations period for personal injury actions. *Burke v. Basil*, 2020 WL

³ While motions to strike are generally governed by Rule 12(f), *Whittlestone, Inc., v. Handi-Craft Co.*, 618 F.3d 970 (9th Cir. 2010), states that motions to strike damages are subject to a Rule 12(b)(6) motion. To the extent this Court disagrees, Defendant alternatively raises the motion to strike certain damages under Rule 12(f).

1 4435138, at *5 (C.D. Cal, July 23, 2020).

2 To be timely, a plaintiff therefore must bring a claim within two years after
3 the claim accrues. While state law governs the length of the limitations period,
4 federal law “governs the determination of the point at which the limitations period
5 begins to run.” *Stanley*, 433 F.3d at 1136. Under federal law, the “touchstone for
6 determining the commencement of the limitations period is notice: a cause of action
7 generally accrues when a plaintiff knows or has reason to know of the injury which
8 is the basis of his action.” *Stanley*, 433 F.3d at 1136 (internal quotations omitted).

9 Plaintiff filed her Complaint on February 16, 2022, and thus, to be timely, the
10 claim must have accrued on or after February 16, 2020. On its face, the Complaint
11 does not meet this timeline.

12 A Title IX claim accrues—and the limitations period begins to run—“when
13 the plaintiff knows or has reason to know of the injury which is the basis of the
14 action.” *Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1048 (9th Cir.
15 2008). Knowledge of the “injury,” the Ninth Circuit has explained, means
16 knowledge of the “actual injury,” not when the plaintiff “suspects a legal wrong.”
17 *Id.*, at 1049–51. The court has often reiterated that a plaintiff does not need to know
18 that she possesses a legal cause of action, she must simply be aware of the actual
19 injury and its cause. *See id.*

20 In the Title IX context, the injury which is the basis of the action is the
21 additional harassment caused by the University’s alleged deliberate indifference.
22 *Davis*, 526 U.S. at 645-650. For the pre-assault claim to succeed, Plaintiff would
23 need to establish the University’s deliberate indifference to prior reports of assault
24 caused Plaintiff’s assault. The claim thus accrued at the time of the injury giving
25 rise to the claim – her assault, on May 20, 2018. (Dkt. 1-1, at ¶ 10.) But Plaintiff did
26 not file her Complaint until nearly four years later, on February 16, 2022—more
27 than two years too late. (Dkt. 1-1.) Plaintiff’s pre-assault claims are therefore
28 untimely.

Under the same logic, Plaintiff’s post-assault claim is time-barred. For a post-assault claim, the injury is the additional harassment caused by the institution’s deliberate indifference (here, the fear of encountering her assailant in a situation within the University’s control) triggers accrual and starts the statute of limitations period. The pre-assault claim is fundamentally the same, except that the plaintiff alleges the deliberate indifference which *caused* Plaintiff’s assault occurred before her assault, i.e., *pre-assault*, and that the resulting additional harassment is the assault itself (May 20, 2018).

Applying these principles, courts have repeatedly held that a plaintiff need not know she has a plausible legal claim for damages for claims to accrue; the claims accrue on the date of the harm, even if the plaintiff does not understand her legal claims until later. For example, in *Lukovsky*, the court considered accrual of a claim for discriminatory hiring practices. The “question” for purposes of accrual was “what must the plaintiffs ‘discover’—that there has been an adverse action, or that the employer acted with discriminatory intent in performing the act?” 535 F.3d at 1048. The court held that the former controlled, and the claim accrued when the individuals “received notice they would not be hired, . . . even if at that point in time [they] did not know of the legal injury, i.e., that there was an allegedly discriminatory motive underlying the failure to hire.” *Id.* at 1051.

Twersky v. Yeshiva University, 993 F. Supp. 2d 429, 439 (S.D.N.Y. 2014), reached a similar result. There, plaintiffs argued their Title IX claim did not accrue “until [the school president] admitted” that he “had been aware of the risk of sexual abuse at [the school].” Before that point, plaintiffs argued they “were unaware that the school defendants had injured them.” *Id.* at 440. The court rejected that argument, explaining: “[d]iscovery of injury [at the time of the abuse] is what starts the clock, regardless of how complex or difficult to discover the elements of the cause of action may be.” *Id.*; see also *Varnell v. Dora Consol. Sch. Dist.* 2013 WL 12146483, at *7 (D.N.M. May 13, 2013) (claim for “failure to prevent” abuse

1 accrued at time of abuse); *Bowling v. Holt Pub. Sch.*, 2017 WL 4512587, at *1–2
 2 (W.D. Mich. May 26, 2017) (claim for “failing to protect” from assault accrued at
 3 time of assault); *A.T. v. Everett School District*, 300 F. Supp. 3d 1243, 1258 (W.D.
 4 Wash. 2018) (claim accrued once plaintiff knew she had been harmed); *Doe*, 2019
 5 WL 4229750. As Judge Wilson explained in *Doe*:

6 Even if Plaintiff generally did not learn until recently about USC's
 7 alleged deliberate indifference spanning over approximately thirty
 8 years, Plaintiff's understanding of her injury at the time of her
 9 examination by Dr. Tyndall means that the statute of limitations period
 10 began to run immediately following the examination. To illustrate,
 11 Plaintiff does not argue that Dr. Tyndall's behavior during Plaintiff's
 12 examination in 1991 was of no consequence; Plaintiff acknowledges
 13 that she knew Dr. Tyndall's examination was abnormal at the time it
 occurred. Instead, Plaintiff merely argues that Dr. Tyndall's behavior
 was of lesser consequence to Plaintiff until she read the Los Angeles
 Times article fully exposing Dr. Tyndall to the public. But this position
 reflects Plaintiff's focus upon “the time at which the consequences of
 the acts became most painful,” *Stanley*, 433 F.3d at 1136 (internal
 quotation marks and citation omitted), not the time at which the alleged
 discriminatory acts by USC and Dr. Tyndall occurred.

14 2019 WL 4229750, at *4. Thus, in *Doe*, the Court dismissed the Title IX claim with
 15 prejudice where the plaintiff alleged she was unaware of the school's policy of
 16 deliberate indifference until she read an article about Dr. Tyndall decades later.

17 The post-assault claim here is likewise time-barred. To prevail on a post-
 18 assault claim, Plaintiff must show (among other things) that the University's
 19 deliberate indifference to her report of assault caused *additional* harassment to
 20 occur. The additional harassment is the “actual injury” that causes the claim to
 21 accrue. Here, the Complaint documents Plaintiff's knowledge of her “actual injury”
 22 well beyond the statutory period. Paragraphs 16 and 17 reference Plaintiff's
 23 knowledge in 2019 of the University's alleged deliberate indifference. Paragraph 18
 24 alleges she communicated this to Title IX, and Paragraph 21 references the
 25 purported harm the alleged deliberate indifference caused Plaintiff, all as of 2019.
 26 Thus, Plaintiff knew or had reason to know of the University's alleged policy of
 27 deliberate indifference in 2019 at the latest, knew this caused her fear of
 28 encountering her assailant, and thus knew of her injury at that time. It is not when

1 she obtained documents in response to a Public Records Act request (§ 36), as that
 2 focuses on the knowledge of a legal right of action, not on knowledge of her alleged
 3 injury. A claim for violation of Title IX or Education Code § 220 requires a
 4 deprivation of education benefit based on gender. If all allegations in her Complaint
 5 are true, Plaintiff was aware of this alleged deprivation long before February 16,
 6 2020, yet did not file the Complaint within the statutory time period. The claim is
 7 time-barred and cannot be cured by amendment.

8 **C. Plaintiff Has Not Adequately Alleged The Elements Of A Pre-**
 9 **Assault Claim**

10 Pleading a pre-assault claim is a heavy burden, because the University can be
 11 held liable only when it “intentionally act[s] in clear violation of Title IX.” *Davis*,
 12 526 U.S. at 642. Proving the University intended to cause a sexual assault by a third
 13 party is difficult. To ensure liability only for “intentional” acts, the Ninth Circuit
 14 imposed a stringent standard for pre-assault claims, requiring Plaintiff to allege that
 15 “(1) a school maintained a policy of deliberate indifference to reports of sexual
 16 misconduct, (2) which created a heightened risk of sexual harassment that was
 17 known or obvious (3) in a context subject to the school’s control, and (4) as a result,
 18 the plaintiff suffered harassment that was ‘so severe, pervasive, and objectively
 19 offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the
 20 educational opportunities or benefits provided by the school.’” *Karasek*, 956 F.3d at
 21 1112 (footnote omitted) (quoting *Davis*, 526 U.S. at 650). Plaintiff cannot meet the
 22 first, third, and fourth element.

23 **1. Plaintiff does not allege an official pre-assault policy of**
 24 **deliberate indifference**

25 First, Plaintiff cannot allege any “policy of deliberate indifference” to a
 26 “known or obvious” risk. To satisfy this element, Plaintiff must meet a “stringent
 27 standard” and show the University “recognize[d] [an] unreasonable risk and actually
 28 intend[ed] to expose [Plaintiff] to such risks without regard to the consequences.”

1 *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011). Allegations of
 2 “negligen[ce], laz[iness], or careless[ness]” are insufficient. *Oden*, 440 F.3d at 1089.
 3 Deliberate indifference requires a defendant to ignore “risks so great that they are
 4 almost certain to materialize if nothing is done,” because “only in such cases” can a
 5 party be deemed to have “allow[ed] the consequences to occur though they could
 6 readily be prevented.” *Delgado v. Stegall*, 367 F.3d 668, 672 (7th Cir. 2004).
 7 Plaintiff cannot meet that high standard.

8 Plaintiff points to three prior instances of sexual assault “against members of
 9 the Gamma Zeta Alpha,” and thus alleges the University “knew or should have
 10 known the *Fraternity posed a risk* of sexual harassment and assault to female
 11 students.” (Dkt. 1-1, ¶¶ 36, 37 [emphasis added].) But nowhere does Plaintiff allege
 12 this purported practice constituted official University “policies” or that adoption of
 13 those “policies” was deliberately indifferent, i.e., that the University knew they
 14 created a heightened risk but kept them regardless. Nor could she. The University’s
 15 official policies evidence a policy of investigating and adjudicating claims of sexual
 16 assault. See, RFJN, Exhibit 1. Plaintiff’s “conclusory allegation[s] based on
 17 information and belief remain[] insufficient under *Iqbal/Twombly*,” especially where
 18 they contradict the University’s official policies. *Menzel v. Scholastic, Inc.*, No.17-
 19 CV-05499-EMC, 2018 WL 1400386, at *2 (N.D. Cal., Mar. 19, 2018); *compare*,
 20 *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 968 (9th Cir. 2010) (finding
 21 there was an official policy because it involved “[d]ecisions to create or eliminate
 22 teams or to add or decrease roster slots for male or female athletes ... , **not**
 23 **practices by individual students or staff.**”) [emphasis added]; *Jackson v.*
 24 *Birmingham Bd. Of Educ.*, 544 U.S. 167, 177 (2005) (allegations of retaliatory act
 25 that was official decision of the board of education is sufficient for Rule 12
 26 purposes).

27 Plaintiff’s allegation the University had constructive knowledge of a history
 28 of sexual harassment/assault by members of the fraternity is likewise insufficient to

1 meet the pre-assault pleading requirements. Plaintiff alleges the University “knew or
 2 should have known” the *Fraternity* posed a risk of harm. (Dkt. 1-1, ¶¶ 36, 37.) But
 3 more is required for these allegations to support an official policy of deliberate
 4 indifference, because deliberate indifference only exists when there is *actual* notice,
 5 not constructive notice: when “an official who at a minimum has authority to
 6 address the alleged discrimination and to institute corrective measures” knows of
 7 issues and fails to respond. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274,
 8 290 (1998); *see also, Oden*, 440 F.3d at 1089 (courts do not impose “liability on
 9 principles of respondeat superior or constructive notice,” instead demanding actual
 10 notice to an official of the defendant”). Courts, applying that principle, have
 11 dismissed Title IX claims absent allegations that sufficiently senior officials knew of
 12 harassment. See, e.g., *Lopez v. Regents of the Univ. of Cal.*, 5 F.Supp.3d 1106, 1123
 13 (C.D. Cal. 2013) (claim inadequate because there were no allegations that
 14 appropriate “University officials” were informed of incidents and “no facts which
 15 explain the nature or scope of information the U.C. Regents possessed”).

16 The same is true here. Even if the allegations in Plaintiff’s Complaint were
 17 true, knowledge of the prior assaults at a fraternity do not evidence that an
 18 appropriate person at the University had actual notice of the risk that Plaintiff faced
 19 from a student unrelated to that fraternity. Nowhere in the Complaint does Plaintiff
 20 allege the University knew or should have known of the risk the *respondent* posed.
 21 The respondent was not a member of the fraternity. This does not meet the stringent
 22 requirements for a pre-assault deliberate indifference claim. Absent knowledge by a
 23 University official with power to act of prior acts from the respondent at issue, or to
 24 institute a policy to prevent future assaults, the University’s failure to do so cannot
 25 constitute a “policy of deliberate indifference.” Accordingly, Plaintiff has not
 26 adequately alleged a policy of deliberate indifference.

27 **2. Plaintiff does not plausibly allege the assault occurred in a**
 28 **context subject to the University’s control**

1 Second, Plaintiff has failed to plausibly allege the University had control over
 2 the context where the assault occurred. *Brown*, 23 F.4th at 1180. *Brown* involved a
 3 situation where the school had notice a male student physically assaulted two other
 4 female students, and he later assaulted the plaintiff at an off-campus residence. *Ibid*.
 5 Even against these facts, the Ninth Circuit held that the University did not have
 6 control over the context of the assault at issue where the assault occurred at an off-
 7 campus residence unconnected to a school activity. The *Brown* court explained:

8 Even though the abuse may not have occurred absent Bradford and
 9 Brown's shared connection to the University, not everything that
 10 happens between fellow students occurs “under [the operations of]” the
 11 institution. 20 U.S.C. §§ 1681(a), 1687. It would be unreasonable to
 12 conclude that Title IX gives educational institutions adequate notice
 13 that accepting federal education funds imposes on them liability for
 14 what happens between students off campus, unconnected to any school
 15 event or activity. *See Davis*, 526 U.S. at 640, 119 S.Ct. 1661.

16 *Brown*, 23 F.4th at 1180.

17 It is Plaintiff’s burden to plausibly allege the assault occurred in a context
 18 subject to the University’s substantial control. She has not met this burden. Plaintiff
 19 alleges the assault occurred in an off-campus fraternity, but the assailant was not a
 20 member of that fraternity. Even assuming the allegations as true, Plaintiff must
 21 plausibly allege the off-campus fraternity is in the University’s control. She has not
 22 done so, and the lack of control is fatal to the Title IX and related California
 23 statutory claims.

24 **3. Plaintiff does not plausibly allege causation**

25 Third, Plaintiff has failed to allege any pre-assault policy of deliberate
 26 indifference caused her to suffer her alleged assault. Specifically, Plaintiff does not
 27 adequately allege a policy of deliberate indifference to a known or obvious risk
 28 because she has not shown any prior assaults were sufficiently similar to the one she
 later suffered. The failure to respond to prior assaults will show “deliberate
 indifference” only if those assaults demonstrated the risk of future assaults like the
 one a plaintiff faced. *See Ross v. Univ. of Tulsa*, 180 F.Supp.3d 951, 968 (N.D.

1 Okla. 2016), *aff'd*, 859 F.3d 1280 (10th Cir. 2017) (a prior complaint of sexual
 2 misconduct “which involved a victim who was unwilling to proceed and who stated
 3 only that [assailant] took ‘advantage of’ her,” was insufficient to put school on
 4 notice that *the same* assailant “posed a ‘substantial risk’ of sexually assaulting other
 5 TU students”); *Gebser*, 524 U.S. at 291 (school district’s knowledge of
 6 inappropriate comments by teacher “was plainly insufficient to alert the principal to
 7 the possibility that [teacher] was involved in a sexual relationship with a student”).

8 The court in *Karasek* analyzed a causation analysis in the context of a pre-
 9 assault claim. There, the court explained “[t]he element of causation ensures that
 10 Title IX liability remains within proper bounds. To that end, adequately alleging a
 11 causal link between a plaintiff’s harassment and a school’s deliberate indifference to
 12 sexual misconduct across campus is difficult.’ *Karasek*, 956 F.3d at 1114. For
 13 instance, if a university systemically failed to discipline employees for harassment
 14 and an employee who had not been disciplined for past harassment committed
 15 further harassment, it is plausible that the university’s policy failure contributed to
 16 that. Here, however, there is no non-conclusory causal link alleged between the
 17 University’s general policy of deliberate indifference—or the heightened risk it
 18 created—and what happened to [the plaintiff] in particular.” *Karasek v. Regents of*
 19 *the Univ. of Calif.*, 2020 WL 6684869, at *19 (N.D. Cal., Nov. 12, 2020); *see also*,
 20 *C.S. v. Madison Metro. Sch. Dist.*, 34 F.4th 536 (7th Cir. 2022) (en banc) (Title IX
 21 does not permit institutional liability based solely on knowledge of the risk of future
 22 misconduct).

23 Here, like in *Karasek*, there are no non-conclusory allegations to establish a
 24 causal link between the University’s purported general policy of deliberate
 25 indifference and what happened to Plaintiff in particular. Without allegations of
 26 alleged prior assaults by that same respondent, the Court cannot weigh whether prior
 27 assaults by members of a fraternity of which the respondent was not a member were
 28 enough to put the University on notice of the risk that the respondent would assault.

1 A contrary holding would “come[] too close to asking that [the University] be held
 2 liable for its failure to ‘purg[e] [its] schoo[l] of actionable peer harassment’ to pass
 3 muster under *Davis*.” *Doe v. California Inst. of Tech.*, 2020 WL 3978081, at *3
 4 (C.D. Cal. May 12, 2020) (citing *Davis*, 526 U.S. at 648) (alterations in original).

5 ***

6 In short, to proceed on her pre-assault claim, Plaintiff must plausibly allege
 7 not just prior assaults—but prior assaults (i) of which an appropriate University
 8 official knew, (ii) that were handled with deliberate indifference, and (iii) that this
 9 deliberate indifference caused Plaintiff’s assault. Because Plaintiff does not
 10 plausibly allege facts along those lines, her claim fails.

11 **D. Plaintiff Has Not Adequately Alleged The Elements of A Post-**
 12 **Assault Claim**

13 A plaintiff seeking to hold an institution liable for post-assault sexual
 14 harassment in violation of Title IX must prove five requirements: (1) the institution
 15 exercised substantial control over both the harasser and the context in which the
 16 harassment occurred; (2) the plaintiff suffered harassment that was so severe,
 17 pervasive, and objectively offensive that it deprived plaintiff of access to
 18 educational opportunities; (3) the institution must have had actual knowledge of the
 19 harassment; (4) the institution was deliberately indifferent to the sexual harassment
 20 and discrimination plaintiff faced; and, (5) the institution’s deliberate indifference
 21 caused Plaintiff to undergo harassment. *Davis*, 526 U.S. at 645-650.

22 Each of these elements is a requirement for Title IX liability, such that failure
 23 to adequately allege any one element renders a plaintiff’s claim infirm. Plaintiff’s
 24 claims should be dismissed because she failed to adequately plead the first, fourth
 25 and fifth elements.

26 **1. Plaintiff has not alleged the University exercised substantial**
 27 **control over both the harasser and the context in which the**
 28 **harassment occurred**

The first element required for a post-assault deliberate indifference theory focuses on the control the University exercises over both the harasser and the context of the harassment. *Davis*, 526 U.S. at 645-650. Plaintiff fails to allege any post-assault harassment that occurred in a context subject to the University's control—much less any harassment that occurred within the limitations period (i.e., between February 16, 2020 and March 20, 2020).

Plaintiff alleges in paragraph 19 that during the delayed investigation (July 2019 to February 2020), she “saw [her assailant] numerous times in Isla Vista causing her to run away and have severe panic attacks.” This allegation fails to meet the requirement of control: there are no allegations that the University had control over the particular, off-campus context. The lack of control is amplified by the timeline here. As set forth in section III(B), *supra*, there is a two-year statute of limitations period. The respondent in this matter last took classes at the University during the winter Quarter of 2020, ending March 20, 2020. Before that, on March 10, 2020, the University transitioned to remote instruction in response to the pandemic. (RFJN, Ex. 3.) When the respondent graduated and left the University, he was no longer within the University's control. *Stanley*, 433 F.3d at 1137 (university not liable for deliberate indifference where plaintiff no longer a student during the limitation period). Plaintiff therefore has not alleged, and cannot allege, the University caused her to undergo any harassment during the limitations period over which the University had control, a time when the respondent was not present at the University.

2. Plaintiff has not alleged the University's response was deliberately indifferent

An educational institution acts with deliberate indifference only where its response to harassment “is clearly unreasonable in light of the known circumstances.” *Davis*, 526 U.S. at 648. This is “not a mere ‘reasonableness’ standard,” but a heightened standard which requires a plaintiff to show the

1 defendant's conduct was "clearly unreasonable." *Id.* at 649. The deliberate
 2 indifference standard is an "exacting standard." *Doe v. Sch. Bd. of Broward County,*
 3 *Fla.* 604 F.3d 1248, 1259 (11th Cir. 2010).

4 To satisfy this standard, a plaintiff must plead facts to support a finding "that
 5 the College made 'an official decision...not to remedy the violation.'" *Oden*, 440
 6 F.3d at 1089, quoting *Gebser*, 524 U.S. at 290; see also *Doe v. Dallas Indep. Sch.*
 7 *Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) ("Actions and decisions by official that are
 8 merely inept, erroneous, ineffective, or negligent do not amount to deliberate
 9 indifference."). District courts can identify an institution's "response as not 'clearly
 10 unreasonable' as a matter of law" and dispose of the claim on a motion to dismiss.
 11 *Davis*, 526 U.S. at 649.

12 Courts finding a university's response to reported sexual harassment to be
 13 deliberately indifferent have done so only under facts far more egregious than the
 14 present case. For instance, in *Williams v. Bd. of Regents of the Univ. System of*
 15 *Georgia*, 477 F.3d 1282, 1296 (11th Cir. 2007), the court found the allegations were
 16 sufficient to withstand a motion to dismiss where the university had knowledge of
 17 an athlete's prior sexual misconduct, but nevertheless recruited him to attend the
 18 school through a special admissions process, then failed to ensure he was informed
 19 of the sexual harassment policy and failed to supervise him, which caused the
 20 plaintiff to suffer a sexual assault. Similarly, in *Hill v. Cundiff*, 797 F.3d 948 (11th
 21 Cir. 2015), the court found the allegations of deliberate indifference sufficient to
 22 withstand a motion to dismiss where the school district effectively used the plaintiff
 23 as bait to catch another student who had been accused of sexual assault.

24 Conversely, courts have held that responses such as the one alleged in the
 25 present case do not amount to deliberate indifference. In *Oden, supra*, the Ninth
 26 Circuit held a nine-month delay in convening a hearing on the Title IX plaintiff's
 27 sexual harassment allegations was insufficient to create a triable issue of fact on
 28 deliberate indifference, even where such a delay was contrary to school policy.

1 *Oden*, 440 F.3d at 1089. This is because conduct that is merely “negligent, lazy, or
 2 careless,” cannot be the basis of Title IX liability. *Id.*

3 Likewise, in *Karasek*, *supra*, the Ninth Circuit held that an eight and one-half-
 4 month delay and a thirteen-month delay did not constitute deliberate indifference.
 5 *Karasek*, 956 F.3d at 1106, 1109-1100. In *Karasek*, the Ninth Circuit also found the
 6 university’s failure to implement protective measures to prevent the possibility the
 7 alleged harasser could harass the complainant again after she reported sexual assault
 8 did not constitute deliberate indifference. The Court reasoned that although the
 9 complainant wanted the male barred from campus during the investigation of her
 10 complaint, particularly given that the university was allegedly aware that multiple
 11 women reported being sexually assaulted by him, the university’s interim
 12 disciplinary decisions were not clearly unreasonable, as there was no indication the
 13 male ever interacted with the complainant again after the assault. *Id.* at 1109.

14 The court in *Moore v. Regents of the Univ. of Calif.*, 2016 WL 2961984 (N.D.
 15 Cal. May 23, 2016), reached a similar conclusion. There, the plaintiff claimed the
 16 University was deliberately indifferent because it did not provide her with
 17 appropriate accommodations, did not issue a no-contact order causing her to see her
 18 assailant on campus, and “discouraged” her from making a Title IX report. The
 19 court held that this was not “clearly unreasonable,” and thus insufficient to
 20 constitute deliberate indifference.

21 Here, like in *Oden*, *Karasek*, and *Moore*, the facts alleged in the Complaint
 22 cannot support a finding of deliberate indifference. The University’s response to
 23 Plaintiff’s reported sexual assault is not clearly unreasonable in light of the known
 24 circumstances. To the contrary, the University responded to Plaintiff’s report by
 25 providing her with the resources available to survivors of sexual assault, helping
 26 with the criminal investigation, and performing its own investigation into whether
 27 there was a policy violation. These actions are not clearly unreasonable--much less
 28 an intentional decision not to remedy the misconduct—and thus cannot support a

1 finding of liability under Title IX.

2 Plaintiff nevertheless alleges the University acted with deliberate indifference
3 by (1) failing to provide academic and housing accommodations; and (2) concluding
4 the Title IX investigation seven months after the law enforcement hold lifted, an
5 amount of time the Ninth Circuit held did *not* constitute deliberate indifference
6 (*Karasek*, 956 F.3d at 1105 (eight and a half and 13-month delays are reasonable);
7 *Oden*, 440 F.3d at 1085 (nine-month delay is reasonable). (Dkt. 1-1, ¶ 58.) Even in
8 totality, these allegations are insufficient to constitute deliberate indifference.

9 **a. The allegations related to academic and housing**
10 **accommodations are insufficient to find deliberate**
11 **indifference**

12 Victims of peer harassment do not have a Title IX right “to make particular
13 remedial demands.” *Davis*, 526 U.S. at 648. Nevertheless, Plaintiff alleges the
14 University was deliberately indifferent by failing to provide Plaintiff academic and
15 housing accommodations. (Dkt. 1-1, ¶ 58.) This general allegation, without details
16 as to what accommodations Plaintiff requested and was denied, is insufficient to
17 meet the deliberate indifference pleading standard. Plaintiff’s allegations fail to
18 demonstrate the University ignored or refused to accommodate Plaintiff.

19 Indeed, Universities have only been held liable under Title IX for refusal to
20 accommodate where the university either ignored a survivor’s request for
21 accommodations or outright refused the accommodation. See, e.g., *Kelly v. Yale*
22 *University*, 2003 WL 1563424 (D. Conn. Mar. 26, 2003). Neither allegation has
23 been, nor can be plausibly asserted in the present case as every academic
24 accommodation Plaintiff actually requested was granted by the University. The
25 general allegation to the contrary, with no facts to establish the plausibility, does not
26 demonstrate deliberate indifference.

27 //

28 //

b. The University did not unreasonably delay the investigation

Plaintiff next complains the delay from report to conclusion constituted deliberate indifference. The facts here, however, show this was not clearly unreasonable. University policies require the University to coordinate with law enforcement. (RFJN, Ex. 1, at 10-11; *see also*, 34 C.F.R. § 106.45(b)(1)(v) (concurrent law enforcement activity is good cause for delay of investigation.) As Plaintiff acknowledges, there was a law enforcement hold, which means the investigating agency – a third party unrelated to The Regents – requested the University hold its investigation, and the University briefly did so. The law enforcement hold was in place for the first seven months after Plaintiff filed her Title IX complaint form. When Plaintiff requested the University proceed with its investigation despite the pending criminal investigation, the University did so. From there, the investigation took seven months, which occurred during the first year of the pandemic. Seven months is well within the case law on what is considered a reasonable timeframe for investigation. *Karasek*, 956 F.3d at 1105 (eight-and-a-half and 13-month delays are not unreasonable); *Oden*, 440 F.3d at 1085 (nine-month delay is not unreasonable). Thus, Plaintiff's allegations of delay are insufficient to conclude the University acted with deliberate indifference.

3. Plaintiff Has Failed To Adequately Plead Causation Or Additional Harassment

To succeed on a claim of discrimination under Title IX, Plaintiff needs to go further than merely alleging deliberate indifference; she must show the deliberate indifference caused her to undergo additional harassment so severe and pervasive that it deprived her of educational opportunities. *Davis*, 526 U.S. at 645. A plaintiff may satisfy the fifth element by pleading and proving that the deliberate indifference either a) caused him or her to experience further sexual harassment or assault or b) made him or her vulnerable to further harassment or assault within the University's

1 control. *Id.*; *Barnett v. Kapla*, 2020 WL 7428321, at *15 (N.D. Cal. Dec. 18, 2020).

2 Several courts have held a plaintiff who has withdrawn from an educational
 3 institution due to a reasonable concern of encountering his or her assaulter can
 4 adequately allege the fifth element when the educational institution failed to take
 5 adequate steps to protect the plaintiff. *See, e.g., Farmer v. Kansas State Univ.*, 918
 6 F.3d 1094, 1103–04 (10th Cir. 2019) (plaintiffs who had withdrawn from various
 7 education opportunities due to concerns of encountering assaulters (other students)
 8 had adequately alleged fifth element where university had failed to take any steps to
 9 keep plaintiff safe), 1105 (collecting similar cases); *Williams*, 477 F.3d at 1297
 10 (plaintiff who had withdrawn from campus due to concerns of encountering
 11 assaulters (other students) had adequately alleged fifth element where university had
 12 failed to take any steps to keep plaintiff safe); *Takla*, 2015 WL 6755190, at *2, 4–5
 13 (plaintiff who did not go to university’s campus due to concerns of encountering
 14 harasser (a faculty advisor) had adequately alleged fifth element where university
 15 failed to keep plaintiff apprised of the status of its informal complaint resolution
 16 process).

17 But these cases have a critical distinction Plaintiff cannot overcome: there is
 18 no authority to support the conclusion that the fear of running into an assailant *off-*
 19 *campus* in a situation outside the University’s control constitutes a violation. And
 20 with good statutory reason, as Title IX only gives rise to liability if the plaintiff is
 21 “excluded from participation in, [is] denied the benefits of, or [is] subjected to
 22 discrimination” under any university “education program or activity,” 20 U.S.C. §
 23 1681(a).

24 The allegations here show the University’s actions did not cause Plaintiff to
 25 suffer additional severe and pervasive harassment *after* her alleged assault and
 26 within the statutory period. There are no allegations that Plaintiff ever encountered
 27 the respondent again, and certainly not in a situation that was within the University’s
 28 control, as the respondent has not been a student since March 2020. And even if

Plaintiff could allege a single incident within the statutory period, no court has held that a single isolated incident of seeing the assailant on campus from a distance amounts to “severe, pervasive, and objectively offensive” harassment. In fact, courts have held the opposite. See *Karasek*, 956 F.3d at 1109; *Ha v. Nw. Univ.*, No. 14 C 895, 2014 WL 5893292, at *2 (N.D. Ill. Nov. 13, 2014) (plaintiff’s allegation her assailant’s “presence on [] campus caused her considerable grief” was not actionable under Title IX when the only interaction she had with him was an “occasional glimpse” on campus); *Tanjaya v. Regents of the Univ. of Cal.*, C.D. Cal. Case 2:19-cv-02956-GW-FFM, Dkt. 56, p. 10 (Judge Wu holding that the plaintiff did not adequately plead the university caused her to suffer further harassment where Plaintiff encountered the assailant twice at on campus facilities).

Plaintiff does not allege that she was “excluded from participation in, denied the benefits of, or subjected to discrimination” under any university “education program or activity,” because of further harassment she suffered that was *caused by* the University’s response. 20 U.S.C. § 1681(a). The general allegations of inability to access educational opportunities are insufficient to demonstrate the post-assault harassment had a “concrete, negative effect” on her education or access to school-related resources. *Davis*, 526 U.S. at 650; see also *id.* at 654. In short, there was no additional harassment, there was no additional harassment that occurred in a context under the University’s control, and there was no additional harassment that occurred in a context under the University’s control that occurred in the limitations period. The Court must dismiss the Title IX claim.

E. Plaintiff Fails to State A Claim for Violation of Educ. Code § 220.

Plaintiff asserts a claim for damages against The Regents pursuant to California Education Code, § 220. Section 220 provides: “[n]o person shall be subjected to discrimination on the basis of ... sexual orientation ... in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.” Cal.

1 Educ. Code § 220. The Court should dismiss this claim (1) because section 220 does
 2 not apply to postsecondary institutions such as the University, (2) because section
 3 220 has an administrative exhaustion requirement which has not been met, and (3)
 4 for the same reasons discussed above with respect to Plaintiff's Title IX claims.

5 The first basis to dismiss looks to the statutory language itself. Section 220
 6 applies only to "educational institution[s]," and Section 210.3 defines "educational
 7 institution" as "a public or private preschool, elementary, or secondary school or
 8 institution; the governing board of a school district; or any combination of school
 9 districts or counties recognized as the administrative agency for public elementary
 10 or secondary schools." Cal. Educ. Code § 210.3. The University is a
 11 "postsecondary" school or institution, not a "secondary" one, and thus section 220
 12 does not apply to it. *Karasek*, 2015 WL 8527338, at * 18 ("section 220 does not
 13 apply to a postsecondary institution such as the University"); see also, Education
 14 Code § 66261.5, *et seq.*, distinguishing between "secondary" and "postsecondary"
 15 as used in the Education Code). Thus, Section 220 does not apply to The Regents.

16 The second basis to dismiss the Section 220 claim again looks to the statutory
 17 language and intent. Education Code § 262.3 imposes an administrative exhaustion
 18 requirement on those looking to file a civil lawsuit for a violation of the chapter.
 19 Specifically, "a person who alleges that he or she is a victim of discrimination may
 20 not seek civil remedies pursuant to this section until at least 60 days have elapsed
 21 from the filing of an appeal to the State Department of Education pursuant to
 22 Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the
 23 California Code of Regulations." Plaintiff has failed to allege she exhausted her
 24 administrative remedies. Even if this statute applied to The Regents, Plaintiff's
 25 failure to exhaust administrative remedies is fatal to this cause of action. *Paul G. v.*
 26 *Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1100 (9th Cir. 2019).

27 The final basis relies on the same analysis set forth above with respect to
 28 Plaintiff's Title IX claim. The elements for demonstrating a claim under Section 220

1 mirror those for a claim under Title IX. *Walsh v. Tehachapi Unified Sch. Dist.*, 827
 2 F.Supp.2d 1107, 1124 (E.D. Cal. 2011), citing *Donovan v. Poway Unified Sch.*
 3 *Dist.*, 167 Cal.App.4th 567, 603–09 (2008). Accordingly, for the same reasons
 4 discussed in the analysis of Plaintiff’s Title IX claim, Plaintiff’s Education Code §
 5 220 must be dismissed.

6 **F. Plaintiff’s Claim for Emotional Distress Damages Must Be**
 7 **Dismissed**

8 Plaintiff seeks to recover damages that are unavailable under Title IX.
 9 Specifically, paragraph 61 and the prayer for relief, paragraph 2, requests general
 10 damages for mental and emotional distress. (Dkt. 1-1.) Even if Plaintiff is given
 11 leave to cure the defects in the pleading discussed above, the damages must be
 12 dismissed with prejudice pursuant to Supreme Court precedent.

13 On April 28, 2022, the Supreme Court ruled that “[e]motional distress
 14 damages are not recoverable in a private action to enforce either the Rehabilitation
 15 Act of 1973 or the Affordable Care Act.” *Cummings*, 142 S.Ct. at 1565. Since those
 16 statutes were enacted under the Spending Clause, federal funding recipients who
 17 could potentially be held liable must have clear notice of the particular type(s) of
 18 damages available. *Ibid.* That is not the case for emotional distress damages, as they
 19 are not traditionally available in suits for breach of contract. *Id.* at 1567. The
 20 Supreme Court’s ruling extends to Title IX claims, as it is one of the four federal
 21 anti-discrimination statutes enacted pursuant to the Spending Clause. *Id.* at 1569-70,
 22 1577-78; *Davis*, 526 U.S. at 640 (“[W]e have repeatedly treated Title IX as
 23 legislation enacted pursuant to Congress’ authority under the Spending Clause....”).
 24 Plaintiff therefore cannot recover emotional distress damages under Title IX, as a
 25 matter of law.

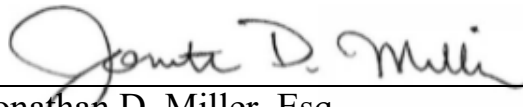
26 **IV. CONCLUSION**

27 For the forgoing reasons, the court should dismiss Plaintiff’s Complaint.
 28 Dismissal with prejudice is appropriate because Plaintiff is incapable of pleading

1 facts establishing a plausible entitlement to relief on any of her claims. See *Lopez v.*
2 *Smith*, 203 F.3d 1122, 1129-30 (9th Cir. 2000).

3 Dated: June 9, 2022

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